MOTION FILED
MAR 10 1989

No. 88-1157

In the Supreme Court of the United States

OCTOBER TERM, 1988

MARTIN MARIETTA CORPORATION, PETITIONER

v.

WILLIAM C. POLLARD, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION OF THE AMERICAN CORPORATE COUNSEL ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AS AMICUS CURIAE IN SUPPORT OF THE PETITION

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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MOTION OF THE AMERICAN CORPORATE COUNSEL ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Pursuant to Rule 36 of the Rules of this Court, amicus curiae American Corporate Counsel Association ("ACCA") requests leave to file the accompanying brief as amicus curiae in support of the petition for writ of certiorari. Counsel for petitioner has consented to the filing of this brief; however, counsel for respondent has declined consent.

ACCA is a national bar association devoted exclusively to the professional activities of attorneys on the legal staff of corporations and other business organizations in the private sector. With 33 local chapters across the country, ACCA has approximately 7,500 members em-

ployed in a legal capacity by some 3,000 organizations. Many of these members are the chief legal officers of their clients.

ACCA and its members have a substantial interest in and expertise regarding issues involving waiver of the attorney-client and work-product privileges. Decisions like the one at issue here substantially constrain the ways in which corporate counsel carry out their responsibilities. ACCA seeks to inform the Court of the importance of the issues raised by the petition, particularly as they affect corporate counsel, and the potential adverse consequences of leaving those issues unreviewed.

For the foregoing reasons, the motion of ACCA to file the accompanying brief as amicus curiae in support of the petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1989

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BRIEF FOR THE AMERICAN CORPORATE COUNSEL ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION

INTEREST OF THE AMICUS CURIAE

The interest of the amicus curiae is described in the preceding motion for leave to file this brief.

STATEMENT

This case arises out of a discovery dispute in connection with the pending criminal prosecution of respondent William C. Pollard in the United States District Court for the District of Maryland. The government alleged that Pollard, in his capacity as president of Maxim

Group, Inc., the travel operations subsidiary of petitioner Martin Marietta Corporation, conspired to defraud the Department of Defense and committed mail fraud by operating a scheme to mischaracterize certain travel cost rebates. Pet. App. 2a.

Following his indictment, Pollard issued a subpoena under Fed. R. Crim. P. 17(c) for certain documents prepared by Martin Marietta and its counsel in the course of an internal investigation of Maxim's practices. Martin Marietta had quoted from some of these documents in a position paper that it submitted (along with a reservation of confidentiality) to the Department of Justice in an effort to persuade the Department not to indict the company for Maxim's activities. Pet App. 8a. In addition, during the course of settlement negotiations with the Department of Justice and the Department of Defense, Martin Marietta had made assertions about the strength of its case based in part upon facts and analyses contained in the subpoenaed documents.

Pollard claimed that submission of the position paper and partial disclosure of the results of the internal investigation during negotiations with the government waived Martin Marietta's attorney-client and work-product privileges as to previously undisclosed underlying documents relating to the same subject matter. Pet. App. 25a, 26a. The district court agreed and ordered production of the bulk of the subpoenaed documents. *Id.* at 32a-33a. When Martin Marietta refused to comply, the court held the company in civil contempt and imposed a fine of $1,000 per day. *Id.* at 18a.

The court of appeals affirmed in substantial part. The court implicitly acknowledged that the materials sought by Pollard's subpoena originally had been covered by the attorney-client and work-product privileges. It held, however, that these privileges had been waived when "otherwise privileged materials were disclosed to the

United States Attorney and the DOD." Pet. App. 6a. Moreover, in determining the scope of this waiver, the court rejected Martin Marietta's argument that the waiver should be limited "to the information that it acually disclosed to the government (copies of which Pollard has been provided) rather than implying a waiver as to all materials on the same subject as those provided the government." *Id.* at 7a. Instead, the Fourth Circuit concluded that "*any* disclosure of a confidential communication outside a privileged relationship will waive the privilege as to *all* information related to the same subject matter." *Ibid.* (emphasis added).

Thus, the court of appeals stated that "if a client communicates information to his attorney with the understanding that the information will be revealed to others, that information as well as ' "the details underlying the data which was to be published" ' will not enjoy the privilege." Pet. App. 7a-8a (citations omitted). Because "all the materials at issue in the present case are either information revealed to others or details underlying the data that was published," the court concluded that "they do not enjoy an attorney-client privilege from disclosure under a Rule 17(c) subpoena." *Id.* at 9a. Similarly, the court held that, in submitting the position paper and disclosing the results of the internal investigation during settlement negotiations, Martin Marietta made "testimonial use" of its work-product privilege in an adversarial proceeding, thereby waiving that privilege as to *all* "non-opinion work product," including materials that had not been disclosed to the government. *Id.* at 11a-13a.

ARGUMENT

When allegations of wrongdoing surfaced relating to Martin Marietta's charging of travel expenses on government contracts, the company retained independent counsel to conduct a thorough investigation of the allegations, both to discover whether improper practices had occurred that required correction and to help the company prepare for possible civil and criminal litigation growing out of the matter. The attorneys interviewed company employees and prepared reports and analyses. It is undisputed that the materials thus generated were, in the first instance, fully protected by the attorney-client and work-product privileges; and it is well recognized that the conferral of such protection is vitally important to a company's ability to conduct a thorough and effective inquiry. See, *e.g.*, *Upjohn Co.* v. *United States*, 449 U.S. 383 (1981); *Diversified Indus., Inc.* v. *Meredith*, 572 F.2d 596, 608-611 (8th Cir. 1977) (en banc); cf. *Hickman* v. *Taylor*, 329 U.S. 495, 510-511 (1947).

Here, Martin Marietta's attorneys used the information they had generated to plan the company's defense against the United States Attorney's criminal investigation and the Department of Defense's civil inquiry—precisely the type of use that the attorney-client and work-product privileges are designed to facilitate. In the course of this defense, the attorneys considered it appropriate to disclose to the government some of the information acquired in their internal investigation. These disclosures were part of a settlement process that ultimately led to resolution of both the civil and criminal investigations. This case is about the impact of the disclosures upon the company's privileges.

The court of appeals held that if, in an effort to settle potential civil or criminal charges, a party makes written or oral disclosure to its adversary of some otherwise privileged information gathered by its attorney, that dis-

closure works an implied waiver of both the attorney-client and work-product privileges. The scope of this waiver is breathtakingly broad. It applies not only to the statements actually made or documents actually disclosed in the settlement effort, but also to all *undisclosed* privileged information upon which any statements of counsel were based, provided only that the undisclosed information relates to the same subject matter. Moreover, this implied waiver allows broadened disclosure to be sought not only by the adversary to whom partial disclosure was made, but also by any third party who may desire the materials in a different proceeding.

Review by this Court is essential for a number of reasons. First, the decision below is bound to have significant deleterious effects on settlement negotiations generally and on the ability of companies to conduct thorough, well-documented internal investigations. Second, the decision is gravely flawed and rests on theories that threaten to undermine the legitimate reach of the attorney-client and work-product privileges. Finally, the decision compounds the confusion in the lower courts on the issue of implied waiver of those privileges—a subject that demands clear and comprehensible rules.

I. THE COURT OF APPEALS' DECISION WILL UNJUSTIFIABLY INHIBIT NEGOTIATED SETTLEMENTS AND IMPEDE INTERNAL CORPORATE INVESTIGATIONS

The decision of the court of appeals is one that few lawyers can afford to ignore, for it has a dramatic impact on the process of accumulating privileged information on a client's behalf and using that information to formulate any litigation strategy that includes efforts at settlement. The problem is especially acute for corporate counsel contemplating the kind of extensive, thoroughly documented inquiry conducted by Martin Marietta in this case. If left undisturbed, the decision is bound to

have a considerable chilling effect both on the settlement process and on the ability of companies to conduct these kinds of investigations.

A. Negotiated settlements enjoy a favored position in the American legal system. See, *e.g.*, *Marek* v. *Chesny*, 473 U.S. 1, 5, 10 (1985); *Williams* v. *First Nat'l Bank*, 216 U.S. 582, 595 (1910); *Ahern* v. *Central Pacific Freight Lines*, 846 F.2d 47, 48 (9th Cir. 1988); *Autera* v. *Robinson*, 419 F.2d 1197, 1199 (D.C. Cir. 1969); see also Fed. R. Evid. 408 and Advisory Committee Notes; Fed. R. Civ. P. 16(c)(7) and 1983 Advisory Committee Notes; Fed. R. Civ. P. 68. By emphasizing compromise, they tend to reduce the likelihood that one side or the other will suffer extremely harsh results. Furthermore, they greatly lessen the hardships that litigation imposes on the parties and on our already overburdened court system. As the D.C. Circuit has stated, the importance of these benefits makes it incumbent upon courts to "encourag[e] methodology that facilitates compromise." *Autera*, 419 F.2d at 1199.

Thus, courts should exercise caution before adopting any rule of law that would have a dampening effect on settlement negotiations. The Fourth Circuit's broad subject matter waiver theory is such a rule. As the petition correctly notes (at 11-12), representations about an attorney's understanding of pertinent underlying facts—which will in most instances derive in significant part from privileged client communications or the attorney's work product—are a commonplace of the negotiating process. Under the rule adopted by the court below, such representations are likely to strip much of the information gathered by the attorney of its privileged status.

If attorneys need fear a broad waiver of the attorney-client and work-product privileges whenever, during settlement negotiations, they make assertions about the merit of their clients' positions or partially disclose in-

formation gathered in representing the client, they will be far more reluctant to make such assertions. Absent disclosures of this sort, however, both sides will be less able to assess the strengths and weaknesses of their cases and therefore less able to determine whether a particular settlement offer is reasonable. It is precisely for this reason that Fed. R. Evid. 408 and 410 confer privileged status upon statements made in compromise negotiations or during plea bargaining. As the Advisory Committee note to Rule 408 explains, the common law rule allowing evidentiary use of factual statements made in such negotiations was rejected because its "inevitable effect is to inhibit freedom of communication with respect to compromise, even among lawyers." [1]

It seems incongruous that factual statements made in settlement negotiations should themselves be privileged, but underlying *undisclosed* fruits of an attorney's representational efforts should lose their privileged status by virtue of such statements. Yet that is the import of the court of appeals' decision. Because of the potentially severe impact of the Fourth Circuit's rule on settlements, it is imperative that this Court review that decision to determine whether the injury it threatens to the settlement process is justified by countervailing considerations.

B. The general concern discussed above has special force in the context of government investigations of businesses for compliance with federal statutes and regulations. Such investigations are usually expensive and time-consuming, and cooperation by businesses in policing

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[1] As the court stated in *American Optical Corp.* v. *Medtronic, Inc.*, 56 F.R.D. 426, 431 (D. Mass. 1972) (Levin Campbell, J.):

> Bargaining, like litigation itself, partakes of the adversary procedure. Negotiated settlements are to be encouraged, and bargaining and argument precede such settlements. Clients and lawyers should not have to fear that positions on legal issues taken during negotiations waive the attorney-client privilege so that the private opinions and reports drafted by an attorney for his client become discoverable.

themselves can be extremely valuable to the federal enforcement scheme. Companies that undertake full, uninhibited, and honest internal investigations are more likely to reform their own conduct voluntarily to meet federal requirements. In addition, a willingness to negotiate openly and candidly with the relevant federal enforcement authority can save the government literally millions of dollars in investigational costs and allow it to redirect its resources to other matters that also require investigation.

This benefit of corporate cooperation with government regulators is seriously undermined by the second aspect of the court of appeals' ruling: the holding that the partial disclosure of information gathered by an attorney in preparation for litigation waives the attorney-client and work-product privileges for all material relating to the same subject matter not only as to the government, but also as to everyone else. It is common across a wide range of areas that the government regulates—securities and antitrust being the most visible—that companies are prepared to reach an accommodation with the government but are quite unwilling to compromise their position in existing or potential private civil litigation involving the same matter. But that is exactly what the decision in this case does, by rendering privileged information accessible to private plaintiffs if other, related information has been disclosed to the government.

The government itself has expressed concern that rulings such as this will discourage companies from cooperating with law enforcement investigations. Thus, the director of the Securities and Exchange Commission's Division of Enforcement has stated:

> Recent decisions have removed certainty concerning waiver of the attorney-client privilege by reason of cooperation with the Commission. * * *
>
> Because there is no certainty here, some corporations have been reluctant to participate in a voluntary dis-

> closure program. * * * The dilemma is real. * * * The desire to preserve the applicability of the privilege and work product claims deters some who might otherwise cooperate with a Commission inquiry. This reluctance on their part makes the Commission staff's job more difficult. * * *
>
> A resolution of the waiver theory is important (i) for public policy purposes, (ii) in order to effectively utilize the Commission's limited resources, (iii) in order to encourage participation in the Commission's voluntary disclosure program to correct past disclosure deficiencies for the benefit of investors and permit the staff to verify the accuracy of such corrections, and (iv) to further encourage parties to cooperate with the enforcement staff in connection with informal and formal Commission investigations.

Roundtable: Attorney-Client Privilege in SEC Investigations, [1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,242, at 85,251-85,253 (Aug. 8, 1982); see also Block & Barton, *Waiver of the Attorney-Client Privilege by Disclosure to the SEC*, 10 Sec. Reg. L. J. 170, 181 (1982) ("Adoption of [the limited waiver] theory would encourage 'corporate housecleaning' for the ultimate benefit of the investing public and would enhance cooperation with the SEC with attendant savings of the Commission's limited time and financial resources.").[2]

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[2] Many of these same concerns underlay the decision by Congress to protect information provided in antitrust investigations in response to civil investigative demands. Recognizing that litigants would bridle at disclosing their indices, digests, and legal analyses of discovery materials to the government if doing so would constitute a waiver of their attorney-client and work-product privileges as to parties other than the government (see H. Rep. No. 870, 96th Cong., 2d Sess., at 8, 11-12 (1980)), Congress provided in the Antitrust Civil Process Act that disclosure of any product of discovery pursuant to a civil investigative demand does not constitute a waiver of any privilege that would have obtained had no disclosure been made. 15 U.S.C. § 1312(c)(2).

C. The implications of the rule adopted by the court of appeals extend beyond the impact on settlements and undermine the incentives for companies to engage in thorough, well-documented investigations of alleged wrongdoing. Such investigations are increasingly recognized as an important part of effective corporate self-governance. See, *e.g.*, Marmaro, *Protecting the Results of Internal Corporate Investigations*, L.A. Law., Nov. 1985, at 36; Mathews, *Internal Corporate Investigations*, 45 Ohio St. L.J. 655, 670-672 (1984); Morvillo, *Voluntary Corporate In-House Investigations—Benefits and Pitfalls*, 36 Bus. Law. 1871 (1981). Those who are responsible for managing a large, modern corporation are often far removed from day-to-day operations. If they are to institute effective reforms to correct abuses and protect their shareholders and customers from the consequences of improper practices, it is important that they have the benefit of the information that uninhibited internal investigations generate.

At the same time, however, responsible corporate officers must take care to avoid exposing the company to liability resulting from the disclosure to litigation adversaries of information gathered in the course of such investigations:

> [G]overnmental or private plaintiffs are increasingly prone to try to short-cut the discovery process by seeking access to the report of the investigation * * *, if such a report exists, and/or to the documentation underlying such a report, including the notes and memoranda of counsel. Because a report and its underlying documentation normally will provide a road-map for those seeking to establish the liability of the corporation and/or its officers and directors, * * * maintaining the confidentiality of these documents frequently becomes a paramount concern.

Block & Barton, *Internal Corporate Investigations: Maintaining the Confidentiality of a Corporate Client's Communications with Investigative Counsel*, 35 Bus. Law. 5, 6 (1979).

By adding materially to the risks of conducting well-documented internal investigations, the Fourth Circuit's implied waiver ruling puts a heavy price on the decision both to conduct such investigations and to use the information thus gathered in an effort to settle with government enforcement agencies. See *Diversified Industries*, 572 F.2d at 611 ("To hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers."). The problems thus generated require the immediate consideration of this Court.

II. THE COURT OF APPEALS' DECISION FUNDAMENTALLY MISAPPREHENDS THE IMPLIED WAIVER DOCTRINE

The court of appeals' decision entitling Pollard to privileged documents and communications that had never been disclosed to the government was based on the doctrine of implied waiver. See Pet. App. 6a-12a. In the Fourth Circuit's view, Martin Marietta's partial disclosures to the government constituted the kind of "testimonial use" of otherwise privileged information that justified a finding that the attorney-client and work-product privileges had been lost as to all materials related to the same subject matter. Three factors contributed to the court's conclusion that Martin Marietta's use of the privileged materials was testimonial. First, the interests of the federal government and Martin Marietta were decidedly adverse during the proceedings at issue. Second, Martin Marietta supposedly made an express assurance of completeness of its disclosures to the United States Attorney.[3] Third, the disclosures were made in a

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[3] The court of appeals' conclusion that Martin Marietta had made an express assurance of completeness of its disclosures was not based upon a finding of fact by the district court and appears to be contrary to the record. See Pet. App. 35a-36a.

direct attempt to settle active controversies between Martin Marietta and the government. Pet. App. 12a. The court of appeals then assumed, without discussion, that the implied waiver it had found vis-a-vis the government could inure to the benefit of Pollard.

The court of appeals' decision evidences a basic misunderstanding of the implied waiver doctrine. That doctrine provides that a privilege is waived "whenever disclosure of a privileged communication threatens to vitiate the continued 'confidentiality' of the privileged material or would, if the privilege were recognized, be 'unfair' to an opposing litigant." *Developments in the Law—Privileged Communications*, 98 Harv. L. Rev. 1450, 1629-1630 (1985). Because the documents that Pollard seeks in this litigation have never been disclosed to anyone outside the company, it is clear that there has been no vitiation of continued confidentiality justifying an implied waiver. Moreover, as we now show, there also has not been any unfair use of the privileged materials of the kind that would entitle Pollard to enforce an implied waiver.

The paradigmatic application of the implied waiver doctrine is when a criminal defendant chooses to testify and then invokes his Fifth Amendment privilege against self-incrimination in an effort to avoid cross-examination. In such circumstances, the cases uniformly hold that the act of testifying impliedly waives the privilege as to all matters reasonably related to the subject matter of the defendant's testimony. See, *e.g.*, *McGautha* v. *California*, 402 U.S. 183, 215 (1971); *United States* v. *Hearst*, 563 F.2d 1331, 1340 (9th Cir. 1977), cert. denied, 435 U.S. 1000 (1978). Similarly, this Court has applied the implied waiver doctrine when a defendant wished to call a private investigator to testify about witness statements contained in a report that the investigator had prepared, yet sought to invoke the work-product privilege to avoid having to disclose the relevant portions of the report for

use in cross-examination. *United States* v. *Nobles*, 422 U.S. 225 (1975). The Court stated that the defendant could "no more advance the work-product doctrine to sustain a unilateral testimonial use of work-product materials than he could elect to testify in his own behalf and thereafter assert his Fifth Amendment privilege to resist cross-examination on matters reasonably related to those brought out in direct examination." *Id.* at 240.

Thus, the hallmark of the doctrine of implied waiver is that it responds to an unfair attempt by the privilege-holder to present a factfinder with only part of the picture, while invoking his privilege to prevent his adversary from providing the rest of the picture. Thus, as one court has observed:

> Most of the cases that have found implied waivers involved assertions by a client that made his confidential communications a material issue in a judicial proceeding, circumstances in which it would be patently unfair to uphold a claim of privilege. Where a privilege-holder has made assertions about privileged communications, but has attempted to bar other evidence of those communications, there is a serious danger that his assertions are false or misleading. Thus, where his assertions have been offered on a material issue in a judicial proceeding, his privilege should be revoked at least with respect to any communications whose disclosure might affect the factfinder's judgment as to that issue.

United States v. *Aronoff*, 466 F. Supp. 855, 862 (S.D. N.Y. 1979) (footnote omitted); see also *Developments*, 98 Harv. L. Rev. at 1632-1635. *Nobles* was such a case; this one is not. Accordingly, *Nobles* will not bear the weight placed upon it by the court of appeals.

By basing its conclusion that Martin Marietta had made "testimonial use" of its privileges on three factors that have no apparent relationship to the concept of "testimony," the court of appeals untethered the implied

waiver doctrine from its moorings in the motion that completeness may be needed to ensure fairness. Had the court recognized this fairness underpinning, it could not have found that Martin Marietta had made "testimonial use" of privileged documents and thereby waived the privileges. Rather, it would have realized that any unfairness potentially inhering in the partial disclosure of privileged materials at trial is not present during ordinary settlement discussions. In the former situation, there is a risk that the factfinder will be misled and that the adversary will be prejudiced as a result. In the latter situation, by contrast, there is no risk of prejudice. If the adversary of the privilege-holder—here, the government—believes that it is not being permitted to see the full picture, it can demand further disclosure and, if unsatisfied with the response, walk away from the table and proceed to litigation.[4]

Thus, as the Second Circuit has stated in a case involving public disclosures of facts contained in privileged materials:

> [W]here * * * disclosures of privileged information are made extrajudicially and without prejudice to the opposing party, there exists no reason in logic or equity to broaden the waiver beyond those matters actually revealed. * * * Although it is true that disclosures in the public arena may be "one-sided" or "misleading", so long as such disclosures are and remain extrajudicial, there is no *legal* prejudice that warrants a broad court-imposed subject matter waiver. The reason is that disclosures made in public rather than in court—even if selective—create no risk of *legal* prejudice until put at issue in the litigation by the privilege-holder.

In re von Bulow, 828 F.2d 94, 103 (2d Cir. 1987) (emphasis in original); see also *Aronoff*, 466 F. Supp. at 862

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[4] In this case, the government in fact sought further information on some points, and Martin Marietta supplied it. See Pet. 4.

("where * * * the privilege-holder has made assertions about privileged communications not to a factfinder at trial, but to his adversary, before trial, and has not, by any affirmative act, placed these communications in issue, it is harder to justify revoking his privilege as to matters not disclosed").

The court of appeals compounded its error by assuming that the implied waiver it found to have arisen from Martin Marietta's submissions to the *government* was automatically available to *Pollard*. Before concluding that these disclosures effected an implied waiver as to Pollard, the court should have inquired whether they could have resulted in any legal prejudice to him that would in fairness require a waiver. Had it done so, it would have found that Martin Marietta's disclosures, like the disclosures in *von Bulow*, did not create any risk of legal prejudice to Pollard.

Neither Martin Marietta nor the government has sought to use any of the partial disclosures of privileged materials in legal proceedings *against Pollard*, nor could they do so. See Fed. R. Evid. 802; *Palmer* v. *Hoffman*, 318 U.S. 109, 113-115 (1943) (documents prepared in anticipation of litigation do not come within business record exception to the hearsay rule). Therefore, there is no risk in this case that, absent complete disclosure of the privileged documents, a factfinder will be misled to Pollard's detriment by partial disclosures. See *Developments*, 98 Harv. L. Rev. at 1654 ("Just because a corporation has treated the [government] unfairly, or because the [government] was interested in only part of the documents made available to it, does not mean that a subsequent claimant has been treated unfairly."). Because Pollard suffered no legal prejudice as a consequence of Martin Marietta's partial disclosures to the government, there is no basis for the broad subject matter waiver imposed by the court of appeals.

III. THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH THE RULINGS OF OTHER LOWER COURTS

It is essential that lawyers be able to determine with a substantial degree of predictability whether evidentiary privileges are applicable. As this Court observed in *Upjohn*, 449 U.S. at 393:

> [I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.

Similarly, in the context of the work-product privilege, the Court has noted that if attorneys had no assurance that their written "interviews, statements, memoranda, [and] correspondence" would be immune from scrutiny by their adversaries, "much of what is now put down in writing would remain unwritten." *Hickman*, 329 U.S. at 511. See also *FTC* v. *Grolier, Inc.*, 462 U.S. 19, 31 (1983) (Brennan, J., concurring).

In no area is the threat to the attorney-client and work-product privileges posed by uncertainty greater than in the area of implied waivers. As noted above, communications made to counsel, and memoranda prepared by counsel, would be of little value if the attorney could not rely on them in various ways, including in his dealings with opposing counsel. Because selective disclosure of privileged information is often critical to effective representation, especially in the settlement context, it is imperative that counsel be aware of the circumstances under which such voluntary disclosures will lead to the *involuntary* divulgence of additional privileged materials. Yet the lower courts that have addressed the question of implied waiver have given little guidance and offered no predictability; instead, they have adopted

widely varying approaches and reached widely varying results.

For example, the Fourth Circuit's holding in this case is flatly inconsistent with the Second Circuit's ruling in *In re von Bulow*, *supra*. There, plaintiffs in a civil suit alleged that the defendant had waived his attorney-client privilege by publishing a book containing a partial disclosure of communications with his attorney. The Second Circuit disagreed, holding that although the matters disclosed were themselves no longer privileged, related matters not disclosed in this "extrajudicial" context remained confidential and continued to enjoy protection of the privilege. 828 F.2d at 102-103. Here too, Martin Marietta's partial disclosures were wholly "extrajudicial," yet the court below imposed a broad subject-matter waiver.

The lower courts also are divided on the extent to which voluntary disclosures to government agencies waive the attorney-client and work-product privileges. Thus, the D.C. Circuit has held that the privileges are waived not only for submissions to a government agency but also for undisclosed communications on subjects covered by the submissions, where the undisclosed communications are sought by another government agency or a grand jury. See, *e.g.*, *In re Sealed Case*, 676 F.2d 793, 822-824 (D.C. Cir. 1982); *Permian Corp.* v. *United States*, 665 F.2d 1214, 1220-1222 (D.C. Cir. 1981).[5] Another court has gone further and held that submissions to the government effect a subject matter waiver even where discovery is sought by private plaintiffs. See *In re Penn Central Commercial Paper Litig.*, 61 F.R.D. 453,

[5] Contrary to the Fourth Circuit's assertion (see Pet. App. 8a), *In re Subpoenas Duces Tecum*, 738 F.2d 1367 (D.C. Cir. 1984), did not involve the situation presented here. The D.C. Circuit held that a company that had turned over documents to the SEC could not assert the attorney-client or work-product privileges to prevent private plaintiffs from gaining access to the *same* documents already disclosed. See *id.* at 1370, 1371.

463-464 (S.D.N.Y. 1973). And yet another court has held in a case involving a discovery request by a private plaintiff that disclosure to the government waives the attorney-client privilege as to all communications on the same subject matter unless, at the time of disclosure, the privilege-holder has specifically reserved the right to assert the privilege in subsequent proceedings. See *Teachers Ins. & Annuity Ass'n of Am.* v. *Shamrock Broadcasting Co.*, 521 F. Supp. 638, 645 (S.D.N.Y. 1981).

On the other hand, some cases involving grand jury subpoenas have held that the privileges are waived only for the submissions themselves, not for undisclosed communications covering the same subject matter. See *In re Grand Jury Subpoena Duces Tecum Dated March 24, 1983*, 566 F. Supp. 883, 884 (S.D.N.Y. 1983); *In re Grand Jury Subpoena Dated July 13, 1979*, 478 F. Supp. 368, 372 (E.D. Wis. 1979). And yet other cases involving discovery requests by private plaintiffs have held that the privileges are waived with respect to neither the submissions nor confidential communications covering the same topics. See, *e.g.*, *Diversified Indus.*, 572 F.2d at 611; *Byrnes* v. *IDS Realty Trust*, 85 F.R.D. 679, 688-689 (S.D.N.Y. 1980).

The Eighth Circuit's decision in *Diversified* is particularly difficult to square with the decision below. In that case, as here, a third party sought access to the privileged fruits of an internal corporate investigation on the ground that disclosures about the investigation had been made to the SEC. The Eighth Circuit held that the voluntary disclosure of privileged documents to a government agency did not waive the privilege as to a private party seeking the same documents. 572 F.2d at 611. *A fortiori*, the privilege was not waived for documents other than those disclosed. This case is identical to *Diversified* in all relevant respects.

Finally, the lower courts are in disagreement as to the effects of disclosures made during settlement negotia-

tions. Thus, some courts have held that disclosures made during settlement discussions with a private party waive the attorney-client and work-product privileges as to undisclosed documents sought by another private party. See *Burlington Indus.* v. *Exxon Corp.*, 65 F.R.D. 26, 45 (D. Md. 1974); *International Business Machines Corp.* v. *Sperry Rand Corp.*, 44 F.R.D. 10, 13 (D. Del. 1968). Other courts have refused to find such a waiver either as to the party to whom partial disclosure had been made or as to third parties. See *Aronoff*, 466 F. Supp. at 862-863; *Sylgab Steel & Wire Corp.* v. *Imoco-Gateway Corp.*, 62 F.R.D. 454, 457-458 (N.D. Ill. 1974), aff'd, 534 F.2d 330 (7th Cir. 1976); *American Optical Corp.* v. *Medtronic, Inc.*, 56 F.R.D. 426, 431 (D. Mass. 1972). And at least one court has employed a balancing test to find a waiver as to a limited set of documents on the same subject matter as a document disclosed during settlement negotiations, while declining to find a waiver as to a broader group of documents on the same subject. See *AMCA Int'l Corp.* v. *Phipard*, 107 F.R.D. 39, 44 (D. Mass. 1985).

In sum, the lower courts are in substantial disarray on a matter of immense practical importance, and the court of appeals' decision in this case contributes greatly to that confusion. Exacerbating the chilling effects of this state of confusion is the unlikelihood that the courts of appeals will be able to provide continuous guidance to district courts faced with waiver issues. Because discovery orders are interlocutory, privilege issues seldom reach the appellate courts, and district courts frequently have the final say on such matters. As the petition explains (at 22-24), this case presents a rare opportunity for the Court to address the waiver question and to bring much-needed certainty and uniformity to this area. For that reason, and because the decision below is plainly wrong and will have severe adverse repercussions in the settlement of litigation, this Court should grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1989